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In the
Supreme Court of the United States
October Term, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, THE NATIONAL SCHOOL BOARDS ASSOCIATION, THE ANTI-DEFAMATION LEAGUE, AND THE COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

This brief is filed on consent of all parties. Letters of consent are on file with the Clerk of this Court.

The New York State School Boards Association (NYSSBA), the National School

Boards Association (NSBA), the Anti-Defamation League (ADL), and the Committee for Public Education and Religious Liberty (PEARL) submit this amici curiae brief in support of respondents, Center Moriches Union Free School District and Louise Tramontano in her official capacity as President of the Board of Education for Center Moriches Schools (hereinafter also referred to as "respondents" or the "school district").

NYSSBA is a not-for-profit corporate instrumentality of the public school districts of the State of New York, and represents approximately seven hundred forty (740) or ninety-four percent (94%) of such public school districts who are members of this Association. Pursuant to section 1618 of the Education Law of the State of New York, NYSSBA has the

responsibility of devising practical ways and means of attaining greater economy and efficiency in the administration of public school district affairs and projects.

NSBA is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 40, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children. The subject of this case concerns every school district in the country. Most school districts have policies which allow use of school buildings by outside

organizations but very few, if any, allow their schools to be used as open public fora.

Since 1913, the ADL has pursued the objective set out in its Charter "to secure justice and fair treatment of all citizens alike." In order to further this objective, ADL has fought steadfastly to remove barriers which have prevented individuals from fully enjoying the rights protected by federal civil rights laws and the Constitution, including the right to privacy, free speech, freedom of religion and equal protection.

In order to protect fully the freedoms of a thriving and pluralistic democracy, ADL is committed to supporting the vitality of our public education system. ADL believes that school

authorities must operate within the parameters of the First Amendment's guarantees of free speech and separation of church and state. The First Amendment is particularly vital in the school setting, where children learn the lessons of citizenship and where respect and tolerance for others must be taught. The authority of school officials to create a limited open forum and maintain control over access to school facilities is an important component of this educational process.

PEARL is a coalition of civic, educational, religious, labor, and civil rights organizations and individual members committed to the preservation of the dual principle of the separation of church and state and the free exercise of

religion, as they relate to affect education in the State of New York.

Pursuant to U.S. Supreme Court Rule 37.3, Amici set forth that they submit this brief in support of the respondents in the present action and urge this Court to affirm the decision of the Second Circuit Court of Appeals.

School districts in this nation, and especially in New York State seek guidance from this Court as to whether state statutes and the application of such statutes which limit the purposes for which public school facilities may be used are constitutional. Amici fear that if this Court reverses the decision below, public school districts will loose their ability to operate as limited open fora because school authorities will be left with only two choices, that is,

either to allow their facilities to be utilized for no outside purposes or for all.

This would be so because under the reasoning advanced by the petitioners, if a school district allows its facilities to be used for any one nonschool related purpose, it would have to permit their use for all other purposes, as well. Once opened, the use of school facilities would have to be made available to even groups which, for example, preach racial intolerance in contravention of the educational mission of our public school system to teach pluralism and mutual respect for all people. (See, Bethel School District No. 403 v. Fraser, 106 S.Ct 3159 (1986); Hazelwood School District v. Kuhlmeier, 108 S.Ct 562 (1988)).

Also, since public school facilities are not traditional public fora, petitioners cannot claim their exclusion rises to the level of a constitutional infringement. Petitioners are free to exercise their constitutional rights in other facilities which are traditional public fora.

Additionally, if petitioners' line of reasoning is accepted by this Court, public school facilities would become available for religious proselytization and other purposes which contravene the educational mission of the public school system.

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in the brief of the respondents.

ARGUMENT

I. Introduction

The Tenth Amendment to the United States Constitution reserves the authority over education to the states. In New York, Article XI §1 of the State Constitution declares that the State legislature shall provide for a system of free public education for all children in the State. In fulfilling its constitutional obligation, the New York Legislature has provided for the establishment of local boards of education, and enumerated the powers and duties attributable to these boards. (See, Basset v. Fish 75 NY 303 (1878)).

Section 414 of the New York State Education Law prescribes the scope of authority public school boards throughout the State may exercise over the custody,

control and supervision of all school district property entrusted to them. This authority includes the discretion to allow public access to school district property under specified conditions and for the purposes specifically enumerated by the statute at issue. (Travis v. Owego-Appalachin School Dist., 927 F.2d 688 (2d Cir. 1991); Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676 (2d Cir. 1988); Trietley v. Board of Educ. of the City of Buffalo, 65 AD2d 1 (1978); see Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), cert. denied 454 U.S. 1123 (1981)). New York public school district facilities are traditionally nonpublic fora. They loose this status and become designated public fora only upon the determination by a school board to open the district's

facilities for one or more of the enumerated purposes in §414. There is no mandate in §414 that a school district permit access for all of the enumerated purposes if it determines it would be appropriate to permit access for only one or two of such purposes. Neither does §414 authorize school districts to provide access to public school property beyond the purposes enumerated therein.

Petitioners argue that the respondent school district has established a designated public forum and that once it has opened its facilities for use by a particular class of individuals it may not preclude others from that class from utilizing the premises regardless of the purpose for which they seek access. They challenge, as view-point discrimination, the

exclusion of religious groups from public school facilities, when those groups seek access to said facilities as a podium for communicating a religious message. Petitioners, thus, ask this Court to reverse the decision of the United States Court of Appeals for the Second Circuit which held to the contrary. Amici respectfully submit the decision below was proper. New York State Education Law §414 properly limits the purposes for which public school facilities may be used when school districts in the state elect to designate as limited open fora the property entrusted to them.

II. Private access to public school facilities under a limited open forum analysis is not determined exclusively by an inquiry into the eligibility of the speaker.

Petitioners challenge the decision of the Second Circuit as contrary to

traditional forum analysis. They contend exclusion from access to public school facilities designated as limited open fora must be based on the nature of the speaker, and not on the nature of the activity involved. However, this Court has held that:

> 'Nowhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for...unlimited expressive purposes.'...The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue. Perry Education Assn. v. Perry Local Educators' Assn., 103 S.Ct 948, supra (1983) (citations omitted).

That special considerations apply in the context of public school facilities has been further recognized by this Court in the case of County of Allegheny v. American Civil Liberties Union, Greater

Pittsburgh Chapter, 492 U.S. 573 (1989), where in condemning the display of a Christian nativity creche on the grand staircase of the county courthouse as an unconstitutional act of government endorsement of religion, and recognizing the result might have been different if along with the creche, there had been on display other symbols which might "neutralize" the religious effect of the creche, this Court nonetheless felt compelled to observe:

> This is not to say that the combined display of a Christmas tree and a menorah is constitutional wherever it may be located on government property. **For example, when located in a public school, such a display might raise additional constitutional considerations. Cf. Edwards v. Aguillard, 482 US, at 583-584 (Establishment Clause must be applied with special sensitivity in the public-school context).** 492 U.S. at 620 (emphasis added).

That forum analysis requires in certain instances more than an inquiry into the nature of the forum and the speaker is further illustrated by the decision of the United States Court of Appeals for the Eleventh Circuit in Chabad-Lubavitch of Georgia v. Miller, 61 USLW 2328 (Dec. 1, 1992), (cf., Americans United for Separation of Church and State v. Grand Rapids, Mi., 61 USLW 2327 (Dec. 1, 1992)). The case has added significance in that it involved private access to a traditional open public forum.

In Chabad, the Eleventh Circuit ruled that private placement of a 15-foot menorah in the Georgia state capitol rotunda amounted to an impermissible governmental endorsement of religion, even though the rotunda was also a public

forum. The court determined the public nature of the forum was only one factor to be considered under Establishment Clause analysis. According to that court, the physical context of the display is the most important factor under Allegheny, supra, and controlled the case before it.

The Eleventh Circuit determined that despite Georgia's policy of allowing a wide range of speech in the capitol rotunda, "many of the persons who enter the capitol building and view the menorah would be unaware of that previous activity," and they "in all likelihood would conclude that the menorah occupies the center of the capitol with the support and approval of the state."

Accordingly, Amici respectfully submit that petitioners' argument that

respondent school district may not consider the purpose for which petitioners or other private groups seek access to public school facilities is without merit.

Furthermore, petitioners' reliance upon Grace Bible Fellowship v. Maine School Admin. Dist. No. 5, 941 F.2d 45 (1st Cir. 1991) for the proposition that respondent school district may not consider the purpose for which petitioners wish to make use of respondents' facilities in determining whether or not to grant their request for access, is misplaced. (Petitioners' Brief at 19, 35, 36).

In Grace Bible the United States Court of Appeals for the First Circuit held that a school district had improperly precluded a religious

organization access to public school facilities for the purpose of providing a free Christmas community dinner. The First Circuit based its holding upon the finding that the school district had created a public forum from which it could not constitutionally exclude religious organizations. However, in its holding the court noted that its decision might have been different if the district had established a "limited" forum as the court noted had been established in Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985).

By contrast, in conformity with Section 414 of the New York State Education Law, respondent school district herein has established a limited open forum. Therefore, Grace Bible is inapposite and the United States Court of

Appeals for the Second Circuit was correct in its analysis below.

III. New York State Education Law §414 does not effect an unconstitutional infringement on free speech by limiting the purposes for which public school facilities may be used.

Petitioners rely on Widmar v. Vincent, 102 S.Ct 269 (1981), for the proposition that "state law cannot justify the denial of the federal constitutional right to equal access for private religious speech" (Petitioners' Brief at 13), and that the denial of access for religious purposes is content-based discrimination of religious speech (Petitioners' Brief at 20-22). Thus, they argue that respondents' reliance on Section 414 of the New York State Education Law for denying petitioners access to their facilities, in the circumstances surrounding this case, is

unsupportable. However, petitioners' reliance on Widmar v. Vincent is misplaced.

In Widmar, this Court held that a state university could not deny access to university facilities to students who desired to conduct religious meetings on campus. The Court noted that "[t]hrough its policy of accommodating their meetings, the University [had] created a forum generally open for use by student groups," and noted that the Court "has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum" (102 S.Ct 269, 273, fn5). Widmar involved the use of university property by student groups, where access to a vast array of such groups had been granted, so that a public forum for

student groups had been created. Therefore, the Court found that the university could not deny access to a student group based on the religious content of the intended speech, absent a showing that such restriction was necessary and narrowly drawn to serve a compelling governmental interest. Id. at 274.

By contrast, the present case involves outside organizations and groups meeting on public school property. In addition, the respondent school district has not afforded access to a vast array of organizations, but has instead complied with the prescriptions of Section 414 of the New York State Education Law in granting access only for certain enumerated purposes. The respondents are therefore not measured by

the same standards as the university in Widmar, and have clearly met the requirement of reasonableness of their exclusion.

Similarly, petitioners' reliance on Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990), is also misplaced. (Petitioners' Brief at 21). As indicated by the Second Circuit in its decision below, this Court decided Mergens purely on statutory grounds noting that it did not need to decide whether the First Amendment requires the same result. As a result, the enactment and application of §414 with its list of limited purposes for which school facilities may be used, does not contravene the free speech protections contained in the First Amendment and petitioners cannot successfully rely on

Mergens for the proposition that once one outside group is allowed in by respondents, they may not refuse to allow in all other groups, irrespective of the purpose for which use of the facilities is sought.

Although this Court in Mergens held there is federal statutory authority that allows the establishment of student bible clubs in public schools if other non-curriculum related student clubs have been permitted to meet on school district property, there is neither a statutory requirement nor a United States Supreme Court ruling extending this authority to permit the use of public school property for religious purposes by outside organizations.

As stated above, the present case deals with the application of an outside

organization to meet on public school facilities for a religious purpose. In their brief, petitioners stress the family values orientation of the film they want to screen at respondent school district's facility in an attempt to obfuscate the fact that their intention is to impart a religious message and perspective through the film. The reality is they wish is to make use of public school facilities to communicate a religious message.

Clearly, the exclusion of the use of public school property for religious purposes is "reasonable" because the exclusion of such category avoids the appearance to the community that the school district endorses and supports a religious message and purpose, in violation of the Establishment Clause.

See Lemon v. Kurtzman, 403 U.S. 602 (1971). By precluding the use of public school facilities for religious purposes, school districts may also avoid the appearance of promoting one particular religious viewpoint in violation of the Establishment Clause, and dissention among the diverse religious groups in the various communities in the state that might result should the use of public school property for religious purposes create such an appearance. (See, Perry Education Assn. v. Perry Local Educators' Assn., 103 S.Ct 948 (1983).

Furthermore, in Perry Education Assn. v. Perry Local Educators' Assn., 103 S.Ct 948, (supra), this Court ruled as constitutional the exclusion of a rival union from access to the public school mail system while granting access

to the representative union. This Court noted that such exclusion was reasonable in light of the "substantial alternative channels that remain open for union-teacher communication to take place" (Id. at 959).

Similarly, petitioners do not claim that they are faced with a situation whereby they will be precluded from engaging in the desired expressive activity if they are not granted access to the respondent school district's facilities. There is no evidence to indicate that petitioners could not rent another facility located within the community to show their film to communicate their religious message.

Amici further submit that the exclusion of petitioners from respondents' facilities does not exhibit

unconstitutional hostility toward religion. (Petitioners' Brief at 36). The use of public school property for religious purposes is merely one category of usage that the legislature has determined is not appropriate for inclusion in the categories authorized by Education Law §414. This exclusion reflects concerns of both the state and the school districts over both establishment clause considerations and uses not directly related to the educational mission of the schools. (See, Trietley v. Board of Educ. of the City of Buffalo, 65 AD2d 1, supra). Also, here, as in Perry, there is "no indication that the school board [or the state legislature] intended to discourage one viewpoint and advance another" by denying access to public school property

for religious purposes. Perry, supra at 957. In addition, while "viewpoint discrimination is, of course, impermissible regardless of the nature of the forum . . . . [and w]hile under some circumstances a disparity between the government's proclaimed justification for denying access to its property and its actual practice might be evidence of viewpoint discrimination", no evidence of any such intent by the state legislature or the respondent school district has been advanced. (Student Coalition for Peace v. Lower Merion School Dist., 776 F.2d 431, 437-38 (3d Cir 1985), citing Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985)).

As further noted by this Court in Perry, the key to the decisions cited by petitioners in support of the premise

that the exclusion of religious uses of public school property is discrimination against religious speech, "was the presence of a public forum." Perry, supra at 960. Although the Court in Perry determined that the forum at issue was nonpublic rather than a limited public forum, the choice of which categories of uses of public property will be permitted in a limited public forum is governed by the same standards as that of a nonpublic forum. In a limited public forum,

> when speakers and subjects are similarly situated, the state may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the state may draw distinctions which relate to the special purpose for which the property is used. (Id.).

Because a school district is only authorized to create a limited public forum, and because a school district is

not authorized to include religious purposes as one of the genre of uses of such limited public forum, religious speech is not equally situated to that of the types of expression authorized on public school property by §414 of the Education Law. Therefore, use of public school facilities for religious purposes may be constitutionally excluded.

IV. Public policy dictates that public school boards in New York State, consistent with their right to direct the educational mission of their schools, be afforded the opportunity to set forth the permissible uses of school facilities in accordance with New York State Education Law §414.

Central to the purpose of this nation's system of public education is the preparation of students for citizenship in a democratic society. Toward this objective, public school officials and the school community must

conduct themselves in a manner which engenders among schoolchildren tolerance, understanding, and a sense of community. Intrinsic to such a commitment is the obligation to avert any direct or indirect involvement in activities which detract from the achievement of this aspiration. (See, Bethel School Dist. No. 403 v. Fraser, 106 S.Ct 3159 (1986)).

New York State public school buildings are not as to the general community traditional public fora, (Travis v. Owego-Appalachin School Dist., 927 F.2d 688 (2d Cir. 1991), supra; Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676 (2d Cir. 1988), supra; Brandon v. Board of Educ., 635 F.2d 971, 980 (2d Cir. 1980), cert. denied, 454 US 1123 (1981), supra; see, Trietley v. Bd. of Educ. of the City of

Buffalo, 65 AD2d 1 (1978), supra, citing Matter of Ellis v. Allen, 4 AD2d 343, 344 (1957), Poulos v. New Hampshire, 345 US 395, 405 (1953); Stein v. Oshinsky, 348 F.2d 999, 1001 (1965)). However, pursuant to New York State Education Law §414, the State's public school districts may elect to open their facilities for designated purposes which serve to further this mission. To compel access to public school facilities irrespective of the purpose for which use of said property is sought, as petitioners propose, is to repudiate the above stated principles.

Furthermore, New York public school boards, as elected bodies representing the interests of their community, must be afforded the discretion to determine whether a requested use of its facilities

should be granted where such use could reasonably be viewed by the public as being supported or encouraged by the school district, and deference should be afforded to such determinations. In addition, public policy also mandates these public officials be provided with such authority.

In Hazelwood School District v. Kuhlmeier, 108 S.Ct. 562 supra, this Court held that school officials must be allowed to place restrictions on student speech as related to school sponsored activities. According to the Court, school officials must be able to retain the right to set high standards for student speech, and to disallow such student speech when it fails to meet the prescribed standards. (Id. at 570). Although Kuhlmeier dealt with the

censorship of certain articles authored by students in a school-sponsored newspaper, the Court recognized that decisions made by school officials concerning the image portrayed by the district must be afforded deference by a reviewing court, "so long as their actions are reasonably related to legitimate pedagogical concerns" (Id. at 571). Section 414 of the New York Education Law provides guidelines within which a school board is authorized to exercise discretion and control over public school facilities, and to make decisions regarding the use of school property according to the principles which support both the State's and the nation's system of public education.

In addition, this Court has also recognized that local school authorities

should be afforded broad discretion in the day-to-day operations of the school district, and emphasized the limiting language of the Supreme Court in Epperson v. Arkansas, 393 U.S. 97, 104-05 (1968), regarding the premise that courts should refrain from becoming involved in such matters.

Absent the authority to exercise such discretion, the Supreme Court's holding in Kuhlmeier and Epperson would be meaningless in regard to the use of public school facilities by outside organizations. Indeed, a school board would be forced to maintain a forum completely closed to use by members of the community or other groups that would otherwise further the educational mission of the school district so as to avoid having their facilities declared

completely open public fora, accessible to all, regardless of possible conflicts with the principles underlying the public education system.

CONCLUSION

NYSSBA, representing the interests of approximately 98 percent of the school boards in the State of New York, and the other Amici, respectfully request that this Court give great consideration to the implications of any decision it may make which restricts the ability of public school districts to operate public school facilities in a manner consistent with the educational mission of the public schools over which school boards have authority. (See, Hazelwood v. Kuhlmeier, 108 S.Ct 562, supra). If the state's public school districts, in accordance with the prescriptions of the

state legislature, are unable to direct the use of their buildings and property, it is likely that at least some element of the "special characteristics of the school environment" will be lost.

For the reasons stated above, the judgment of the court below should be affirmed.

Respectfully submitted,

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